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JOHN F. DAVIS, CLE

No. 73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FIRST SECURITY BANK OF UTAH, N.A., *Petitioner*

v.

COMMERCIAL SECURITY BANK, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S BRIEF

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PETITIONER'S BRIEF

I

OPINIONS BELOW

The opinion of the District Court is reported in 236 F. Supp. 457. It appears in the transcript of record at page 25. The judgment of the Court of Appeals, rendered without opinion, has not been reported. It appears in the transcript of record at page 35.

II

JURISDICTION

The judgment of the United States Court of Appeals was entered on November 18, 1965 (Tr. 3). Petition for certiorari was granted by this Court on May 2, 1966.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III

STATUTES INVOLVED

A.

Section 36(c) of Title 12 of the United States Code, as amended, provides in part:

> "36. . . . (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches:
>
> (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and
>
> (2) At any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to

[1] On the same date certiorari was granted in No. 1126 October Term 1965, on the petition of *Saxon, Comptroller* against Respondent, upon the same record as the instant one; and in No. 875 October Term 1965, upon the petition of *The First National Bank of Logan, Utah* v. *Walker Bank and Trust Company*, to the United States Court of Appeals for the Tenth Circuit. All are consolidated for argument.

location imposed by the law of the State on State banks."

12 U.S.C. 36(c)(1) was enacted in 1927; 12 U.S.C. 36(c)(2) was not enacted until 1933.

B.

Utah Code Annotated, 1953, Sec. 7-3-6, as amended, provides in part:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

IV

QUESTION PRESENTED

1. Whether, pursuant to the provisions of United States Code, Title 12, Sec. 36(c)(1), *as amended*, which empowers the Comptroller of the Currency

> to authorize national banks to establish and operate branches within the limits of the city in which said national bank is situated, if such establishment and operation are at the time expressly authorized to State banks by the laws of the State in question,

and, in view of Utah Code Annotated, 1953, Sec. 7-3-6, as amended (which authorizes Utah state banks to establish and operate branches in cities of the size of Ogden by acquiring an existing bank), the Comptroller may authorize a national bank to establish a branch in Ogden, Utah, by means other than that of acquiring an existing bank.

V

STATEMENT OF THE CASE

The facts are not in dispute. Petitioner is a national bank with its principal office and one branch in Ogden, Utah (R. 21). Respondent is a state bank with its principal office and one branch in Ogden, Utah (R. 13).

Two other state banks have their sole offices (called unit banks) in Ogden, namely, the Bank of Utah and the Bank of Ben Lomand (R. 15).

Ogden is classified as a city of the second class under the Utah Bank Statute (Utah Code Ann., Title 10, Chap. 1, Sec. 1 (1953, as amended)) (R. 15).

On June 25, 1963, Petitioner filed an application with the Comptroller of the Currency, pursuant to Title 12, United States Code, Section 36(c)(1) requesting permission to establish a second branch in Ogden (R. 21). On July 18, 1963, Respondent brought the action below, seeking to enjoin the Comptroller of the Currency from approving such application on the ground that it would violate 12 U.S.C. 36(c)(1) because Petitioner was not taking over an existing bank for its branch (R. 12, *et seq.*).

On June 9, 1964, the Comptroller notified Petitioner that its branch application had been approved (R. 21). The Court then enjoined the Comptroller, *pendente*

lite, from issuing the Certificate of Authority to Petitioner for the branch in question, such being a prerequisite to the opening of the branch (R. 19, 20).

Upon motion of the Comptroller to dismiss the complaint, and the cross motions for summary judgment of Petitioner and Respondent, District Judge Walsh decided in favor of Respondent, filing a memorandum on December 18, 1964, in which he held that Petitioner's branch could be granted by the Comptroller only if Petitioner followed Utah law by taking over an existing bank for its branch (R. 25-33; 236 F. Supp. 457).[2]

Upon appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed, without opinion, relying entirely upon *Walker Bank & Trust Co.* v. *Saxon, supra.*

Petitioner contends that the decision by the courts below in the instant case and by the Tenth Circuit in *Walker Bank & Trust Company* v. *Saxon, supra,* are in conflict with the decision and opinion of the United States Court of Appeals for the Fourth Circuit in *First Natoinal Bank of Smithfield* v. *Saxon* (4th Cir. 1965), 352 F. 2d 267. Petitioner urges that the rationale of the Fourth Circuit be followed by this Court in this case, and that the judgment below, preventing the Comptroller from authorizing the branch to Petitioner, be reversed.

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[2] Judge Walsh expressly disagreed with the opinion of Judge Christensen of the District of Utah in *Walker Bank and Trust Company* v. *Saxon, Comptroller and First National Bank of Logan, Utah,* handed down on September 30, 1964, 234 F. Supp. 74. Judge Christensen's decision was reversed on appeal in *Saxon, Comptroller and First National Bank of Logan, Utah* v. *Walker Bank and Trust Company,* on October 26, 1965, in 352 F. 2d 90. This Court granted certiorari. See footnote 1, page 2, *supra.*

VI

SUMMARY OF ARGUMENT

(1) The governing language in Section 36(c)(1) is clear and unambiguous, requiring only that the Comptroller look to see if branch banking is permitted by state law within the city, town or village in question; if so he may permit branch banking by a national bank in such city, town, or village.

(2) Assuming, *arguendo,* that Section 36(c)(1) was not clear on its face, the Congressional history indicates that Congress did not intend the various conditions as to branching found in the state laws to be incorporated by reference into Section 36(c)(1); it intended to allow branching by national banks, in the discretion of the Comptroller, in those geographical areas where state banks were permitted to branch;

(3) The construction urged by the Comptroller and Petitioner is consonant with sound policy to exempt national banks from state control except where Congress has clearly spoken to the contrary;

(4) It would be contrary to public policy to predicate the authorization of branch banking solely upon a procedure which inherently tends to stifle competition, namely, by acquiring existing competing banks;

(5) The construction urged by the Comptroller and Petitioner is a reasonable one and is supported by the contemporaneous administrative determination of the agency empowered to enforce the Act; and therefore should be adopted.

VII

ARGUMENT

(A) Introduction

The instant controversy arises because of differing views as to the construction to be given to Section (c)(1) of Section 36, Title 12. Section 36(c)(1) states:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches:
>
> (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; * * *"

The Comptroller and Petitioner contend that Section 36(c)(1) empowers the Comptroller to authorize, in his discretion, the establishment of a branch by a national bank within the city, town or village in which the petitioning national bank is located, if the state in question authorizes branch banking within such city, town or village. Respondent, on the other hand, contends that not only must the state authorize branch banking in the respective city, town or village, but also that the Comptroller must adopt as his own and apply the conditions and prerequisites set down by the state law with regard to state branching.

In other words, under Respondent's theory, Section 36(c)(1) incorporates by reference the conditions contained in the state law applicable to branching. Under the construction advocated by the Comptroller and Petitioner, the Comptroller's discretion is not thereby circumscribed; he has the discretion to establish such

criteria as he deems in conformity with federal law and policy, needing to look to state law in the first instance only to ascertain if branch banking, *per se,* is permitted by the state in the city, town or village involved.

Bringing these contentions more precisely into focus, Petitioner and the Comptroller contend that the Comptroller may authorize the branch herein sought by Petitioner in Ogden, Utah, under such conditions as he deems appropriate and in conformity with federal policy. Respondent, on the other hand, argues that the Comptroller cannot permit the branch here in question unless Petitioner acquires a presently existing bank because, under the Utah law, a state bank cannot obtain a branch in cities of the size and class of Ogden unless it takes over an existing bank for the branch. This condition, admittedly, the Comptroller has not seen fit to impose.

(B) The Language of Section 36(c)(1) Is Clear and Does Not Incorporate as a Part of Federal Law the Conditions Under which the States Permit Branching

There is no mystery or ambiguity inherent in Section 36(c)(1). It authorizes a national bank to establish a branch within the city, town or village in which its main office is located (i.e. to establish an "inside" branch) provided:

(1) The establishment of branch banks is authorized to State banks by State law within the city, town or village involved, and

(2) The Comptroller approves the particular branch in question.

Section 36(c)(1) does no more than this.

Respondent contends, on the other hand, that Section 36(c)(1) requires the Comptroller to adopt and apply

state law standards in determining whether or not to approve a branch request by a national bank. The Act, however, simply does not say this.

If Congress had desired to incorporate by reference and impose upon national banks the conditions contained in the respective state laws dealing with branching, it could easily have done so. Indeed, it acted in this manner in Section 36(c)(2) where, with regard to the geographical location of "outside" branches by a national bank, it required that such outside branches be "subject to the restrictions as to location imposed by the law of the state on state banks."

Petitioner's construction is further substantiated by reading Section 36(c) as a whole. Sections 36(c)(1) and 36(c)(2) both contain the phrase "if such establishment and operations are . . . expressly authorized to State Banks by the law of the state in question." This language, presumably, forms the basis for the contention that both Section 36(c)(1) and 36(c)(2) incorporate the conditions of state law as to branching with regard to branching by national banks (Tr. 27, 31). If, however, such be the case, then the language in Section 36(c)(2), specifically making applicable state restrictions as to location, becomes pure redundancy.

This form of construction however, is not preferred nor will it be adopted if another reasonable construction is available which gives effect to all of the language used. *Jarecki* v. *G. D. Searle & Co.* (1961), 367 U.S. 303, 6 L. Ed. 2d 859; *United States* v. *Menasche* (1955), 348 U.S. 528, 99 L. Ed. 615. The construction urged by the Comptroller and Petitioner is manifestly reasonable. Indeed, it simply gives meaning to the language as written.

(C) The Congressional History of Section 36(c)(1) Reveals That Congress Did Not Intend To Circumscribe the Comptroller's Authority by Subjecting National Bank Branching to Conditions of State Law

The trial court, recognizing that its construction ignored the differences of language between Sections 36(c)(1) and 36(c)(2), nonetheless attempted to justify its construction upon an alleged intent and purpose of the statute (Tr. 31).[3] In the first place, courts are not free to construe a statute where its meaning is clear. *Yates* v. *United States* (1957), 354 U.S. 298, 1 L. Ed. 2d 1356; *United States* v. *Missouri Pacific R. Co.* (1928), 278 U.S. 269, 73 L. Ed. 322. Secondly, courts should confine themselves to construing a statute as written and not attempt to change or modify the law. *Iselin* v. *United States* (1926) 270 U.S. 245 at 250-251; 70 L. Ed. 566 at 569-570.

Assuming, *arguendo,* that the statute here involved is ambiguous on its face, and thus susceptible to judicial construction, it by no means follows that the intent of Congress was to graft upon the federal law here involved the varying conditions of the respective states. To the contrary, the history[4] of legislation here involved completely supports the literal meaning of the statute urged by Petitioner and the Comptroller.

Congress simply intended to authorize national bank branching, in the discretion of the Comptroller, if:

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[3] *Walker Bank & Trust Company* v. *Saxon, Comptroller, supra,* involved the same statute as the case at bar. The Tenth Circuit employed the same reasoning as Judge Walsh in the district court, namely, a Congressional intent to achieve "competitive equality" between state and national banks.

[4] Where a statute is ambiguous, resort should be had to its legislative history to determine the intent of Congress. *United States* v. *Zacks* (1963), 375 U.S. 59, 11 L. Ed. 2d 128.

(1) the branch is to be located in the city, town or village where the national bank is located; and (2) the state in which such national bank is located permits branch banking in the city, town or village involved.[5]

Prior to 1927, national banks were not authorized to have branches. *First National Bank in St. Louis* v. *Missouri* (1924), 263 U.S. 640, 68 L. Ed. 486. Many state banks, however, were empowered by their state law to branch; and state banks with branches which became national banking associations were authorized by Section 5155 of the Revised Statutes of the United States to retain and continue their branch operations.

The essential inequity inherent in this system, and particularly the adverse impact which state branching was having upon the national banking system, became a matter of grave concern to the Comptroller of the Currency, as reflected by his Annual Report to the Congress for 1923 (Annual Report of the Secretary of the Treasury for 1923, p. 732.) Accordingly, he pressed for legislation authorizing branching by national banks. (See e.g. Annual Report of the Secretary of the Treasury for 1924, p. 610; 65 Cong. Rec. 11297).

By 1926, in recognition of the fact that national banks had the chief burden of supporting the Federal Reserve system, and that they had been unable to compete with state chartered banks in a state authorizing state-bank branching, the House Committee on Banking recommended a bill, H.R. 2, declaring there

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[5] A third requirement relating to the population of the city, town or village involved was originally included but has since been deleted. If Congress had intended to incorporate state law as Respondent and the courts below urge, it is difficult to explain this requirement, or, indeed, the requirement in Section 36(d) selling capital requirements, which presumably would conflict with the law in various of the states. See p. 9, *infra*.

to be national policy on branching which would permit national banks to have branches within their home cities, towns or villages, in those states which permitted state banks to have branches (H. Rept. No. 83, 69th Cong., 1st Sess., pp. 4-5, 7). This bill, as a corollary, limited those state banks which were members of the Federal Reserve system to branching within their home cities, towns or villages (H. Rept. No. 83, *supra,* pp. 4-5, 7).

As stated by that Committee:

> "The bill recognizes the absolute necessity of taking legislative action with reference to the branch banking controversy. The present situation is intolerable to the national banking system. The bill proposes the only practical solution by stopping the further extension of state-wide branch banking in the Federal Reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws." (H. Rept. No. 83, *supra,* p. 7).

H.R. 2, commonly called the "McFadden bill" after its principal sponsor, passed the House and went to the Senate.

In recommending similar views, the Senate Committee on Banking and Currency stated:

> "Under the House bill * * * branch banking would be permitted for national banks * * * at the discretion of the Comptroller of the Currency in cities where State banks can have branches, and national banks would be denied the right to have branches at all in any State which denied to State banks the right to have branches." (S. Rept. No. 473, 69th Cong., 1st Sess., (1926) p. 8).

H.R. 2, with certain modifications not here involved, was thereupon passed by the Senate and signed into law, becoming what is now Section 36(c)(1). After the passage of this legislation, Congressman McFadden summarized the conditions under which national banks were authorized to establish branches under this bill as follows:

> "First. The national bank must be located in a State which by law permits State banks to have branches. There must be a positive affirmative statutory authorization of branch bank territory in which national banks will be permitted to have branches.
>
> "Second. The national bank must be located in a city having a population of 25,000 and over before any application for a branch or branches can be considered. [This condition was deleted in 1933, 48 Stat. 162, 190.]
>
> "Third. The branch or branches must be located within the limits of the city, town, or village in which the parent bank is located. Although the word 'corporate' was inadvertently omitted in the Senate amendment in connection with the words 'limits of the city' to designate the territory to which branch banking must be confined, the debates in both houses of Congress indicate clearly that branch banking must be confined to the corporate limits of the city, town or village in which the parent bank is located, and not permitted in contiguous territory, or in what may be termed the social, economic or metropolitan area surrounding or adjacent to the city, town or village. If there is any doubt on this question, the legislative intent must govern, and it was clearly the purpose of Congress to forbid the establishment of new branches outside of corporate limits." (68 Cong. Rec. 5716, 69th Cong., 1st Sess. 1927).

It is evident, then, that the purpose of Section (c)(1) was to limit branches of national banks to the limits of the city in which the bank is located and to prevent national banks from opening branches in states which did not authorize branch banking. There was no other purpose, either expressed or implied.

Although minor amendments have been made to Section (c)(1) since its enactment, the purpose and substance have not been changed since then.

Section 36(c)(1) was enacted prior to the 1929 stock market crash. The panic and depression following that crash led in 1933 to the enactment of the Bank Act of 1933, also known as the Glass-Steagall Act (Act of June 16, 1933, 48 Stat. 162). This Act is the origin of Section 36(c)(2).

When the 1933 Act was before the Senate Banking and Currency Committee, that Committee proposed to authorize national banks to establish branches "not merely in the towns and cities in which they are located, but also outside of such limits at any point within the borders of the State in which they exist, irrespective of State laws." (S. Rept. No. 584, 72d Cong., 1st Sess., (1932) p. 11). Under certain conditions, in fact, branch banking across state lines would have been permitted, provided the usual business of the bank involved extended across state lines. State banks, of course, could not have branches across state lines, so the bill certainly involved no concept of competitive equality at that point.

When this bill reached the floor of the Senate in January of 1933, it had developed considerable opposition; thus, Senator Glass, its principal sponsor in the Senate, announced on the floor that he would forego

the provision which would authorize national banks to establish banking branches irrespective of state law, rather than have the whole Act fail; instead, he stated he would accept a provision which would confine branch banking to those states in which state banks could branch. (76 Cong. Rec. 1997, 72nd Cong., 1st Sess. 1933). This concession by Senator Glass was incorporated by the so-called "Bratton Amendment" which read:

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches within the limits of the city, town or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized for State banks by the law of the State in question." (76 Cong. Rec. 2079.)

To this amendment, the following clause was then added:

> "and under restrictions as to location imposed by the law of the State on State banks." (76 Cong. Rec. 2079.)

The Senate thereafter agreed to and passed the above amendment (79 Cong. Rec. 2208). The House, however, did not act upon this amendment. The next session, the Senate again passed a bill incorporating the above amendment (S. Rept. No. 77, 73d Cong., 1st Sess., pp. 11, 16-17), characterizing the branching provisions in part as follows:

> "The branches so established are also to be subject *to the restrictions as to location imposed by the law of the State upon State banks* * * *." (S. Rept. No. 77, 73rd Cong., 1st Sess., (1933) p. 11). (Emphasis added).

In the First Session of the Seventy-third Congress the House passed a different bill. The two bills were then sent to the Conference Committee for reconciliation of the divergent views between the two Houses. In conference the Conference Committee separated the first portion of the Bratton amendment relating to "inside branches" from the second portion of that amendment relating to "outside branches." And, with regard to "outside branches" only, the additional requirement that such be subject to the "restrictions as to location imposed by the law of the State on State banks" was added. (H. Rept. 254, 73rd Cong., 1st Sess., p. 29; 77 Cong. Rec. 5781). Thus, insofar as Section 36(c)(1) (which dealt with inside branches) was concerned, the Conference bill was little other than a restatement of the existing law.

During the explanation of the bill by the House Conferees to the House, the phrase "compete on equal terms" was used. 77 Cong. Rec. 5896. This phrase, however, was used solely with regard to the amendment dealing with "outside" branches, which when enacted became Section 36(c)(2). Earlier Senator Glass had spoken in terms of competitive equality—but he did not define his remarks. (77 Cong. Rec. 3726).

It thus can be seen from the Congressional history that Congress did not intend to circumscribe the authority of the Comptroller by making national bank branching subject to the same *conditions* as might be contained in the laws of the respective states. To the contrary, the legislation adopted by Congress concerned itself solely with geographical or territorial limitations, and in this regard it authorized the Comptroller to approve branching by national banks in those areas

wherein state law permitted branching. On the other hand, where a state did not permit branching within its boundaries or the boundaries of the city, town or village involved, then the right to branch therein by a national bank was similarly denied. This was the competitive equality about which Congress spoke.

The above legislative history was recognized as controlling by the Fourth Circuit in its study of Section 36(c), set forth in *First National Bank of Smithfield* v. *Saxon* (1965), 352 F. 2d 267.

In *Smithfield,* the First National Bank of Eastern North Carolina applied to the Comptroller of the Currency for authorization to establish a branch in the town of Smithfield, North Carolina. The applicant had its principal office at New River, North Carolina, and also had eleven branches in the eastern part of the State. Subsequently, the Comptroller of the Currency gave the necessary approval to the applicant Bank, but without a formal statement of facts, conclusions of law or opinions. A rival national bank, the First National Bank of Smithfield, then brought an action to have the Comptroller's determination declared illegal and enjoined. The plaintiff bank contended that the Comptroller's permission to a national bank to branch is contingent upon compliance by the Comptroller with the inquiries and ascertainments required of the State Commissioner of Banks by North Carolina law. The North Carolina law provided that no branch should be permitted save upon the approval of the Commissioner of Banks, which "may be given or withheld by . . . [him] in his discretion"; that "in exercising such discretion . . . [he] shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant

. . . its future earnings prospects, and the general character of its management"; and that the approval shall not be given until the Commissioner shall have "ascertained to his satisfaction (i) that the establishment of such . . . will meet the needs and promote the convenience of the community to be served by the bank and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch . . . and of the existing bank or banks in said community."

The plaintiff national bank argued that all of these requirements of North Carolina law were incorporated into 12 U.S.C. 36(c). In answer, the Fourth Circuit said at 352 F. 2d 271:

> "* * * We disagree with the argument. Assuming arguendo that the North Carolina statute does demand as a condition precedent to the approval of a branch, an ascertainment of need and convenience, with discretion in decision nevertheless always retained by the Commissioner, in our judgment this command has not been extended to the Comptroller by the National Banking Act."
>
> "That the phrase 'restrictions as to location' does not advert to economic factors of need and convenience, but refers exclusively to a geographical determination is quite plain from the legislative history of the Act. In Congress, debate on the bill which became the heart of the current Act, 12 U.S.C. § 36(c), supra, was between advocates of unlimited National bank branching and those favoring its equation with the branch privileges of State banks. Generally the latter had been confined to the municipality of the parent bank, to immediately adjacent areas or to other territorial regions. By way of compromise the present clause was added with the intent of

> restricting National branches to the city-wide, county-wide or State-wide delimitation circumscribing the State banks. There was no other reason for the words 'subject to the restrictions as to location imposed by the law of the State on State banks.' H. Rept. 83, 69th Cong., 1st Sess., pp. 2, 4-7 (1926); 68 Cong. Rec. 5816; McFadden Act, 44 Stat. 1228; S. Rept. 584, 72nd Cong., 1st Sess., pp 1-6, 11; S. Rept. 77, 73d Cong., 1st Sess., pp. 11, 16-17; 77 Cong. Rec. 3726, 5896; Banking Act of 1933, 48 Stat. 189, 12 U.S.C. § 36(c)."

See also: *Whitney National Bank* v. *Bank of New Orleans* (1965), 379 U.S. 411, at 413, 13 L. Ed. 2d 386 at 390, wherein this Court by way of footnote referred to Section 36(c)(2) as making applicable to national bank branches state law restrictions as to "geographical limitations."

Almost identical reasoning to that utilized by the Fourth Circuit was employed by the United States District Court for the District of Utah (Judge Christensen) in *Walker Bank and Trust Company* v. *Saxon* (D.C. Utah 1964), 234 F. Supp. 74 at 78-79. As stated *infra,* p. 5, the latter opinion was overturned, however, by the Tenth Circuit, which reached the opposite conclusion from the Fourth Circuit, erroneously we submit. It was the Tenth Circuit's opinion which the District of Columbia Circuit adopted without further comment for its decision in the instant case. Petitioner submits that the District of Columbia Circuit and the Tenth Circuit erred in their views, and respectfully urges this Court to accept the views of the Fourth Circuit.

(D) The Comptroller's Position Is in Accord With Sound Policy That a National Bank Should Not Be Regulated by the States Except to the Extent Congress Has Provided

The paramount authority of Congress over national banks, has been long recognized. This is so because national banks are instrumentalities of the federal government, *Davis* v. *Elmira Savings Bank* (1896), 161 U.S. 275, 40 L. Ed. 700. Thus, as stated in *Van Reed* v. *People's National Bank* (1905), 198 U.S. 554, 557, 49 L. Ed. 1161:

> "National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the government may permit."

Accord: *Mercantile National Bank* v. *Langeau* (1963), 371 U.S. 555, 9 L. Ed. 2d 523; *Franklin National Bank* v. *New York* (1954), 347 U.S. 373, 98 L. Ed. 767.

When Congress enacted 12 U.S.C. § 36, it occupied the field in connection with branch banking by national banks. States may regulate branching by national banks only to the extent provided in 12 U.S.C. § 36 and no further. Nowhere in Sections 36(c)(1) or 36 (c)(2) can language be found authorizing the various conditions which exist in the laws of the respective states to be imposed upon the Comptroller as the test of whether a branch of a national bank can be established.

Indeed, such a provision would be completely out of harmony with the concept that the National Bank Act

constitutes by itself a complete system for the establishment and government of a national bank system. *Deitrick* v. *Greaney* (1940), 309 U.S. 190 at 194, 84 L. Ed. 694 at 697. And, in absence of clear and express language incorporating state law into a federal act, it is assumed that Congress intends its laws to operate uniformly throughout the nation. *Jerome* v. *United States* (1943), 318 U.S. 101 at 104, 87 L. Ed. 640 at 643; Accord: *United States* v. *Turley* (1957), 352 U.S. 407, 1 L. Ed. 2d 430.

(E) The Construction Urged by Respondent and the Courts Below Is Contrary to Established National Policy

While it is true that state laws may be applicable to a national bank under certain circumstances permitted by Congress, state law is not applied to national banks where the effect would be contrary to national policy or would frustrate the policy of national banking. *First National Bank of San Jose* v. *California* (1923), 262 U.S. 366, 67 L. Ed. 1030; *McClellan* v. *Chipman* (1896), 164 U.S. 347, 41 L. Ed. 461.

The interpretation urged by Respondent and the lower courts in this case not only frustrates the concept of an orderly unified system of national banking, but also contravenes established public policy.

The Utah statute on its face favors bank mergers and acquisitions rather than the establishment of competition, even to the point of monopoly in some instances. Thus, for example, in a city where there were but two banks, both state, the only way one of the banks could open a branch would be to acquire the other one. Such theories are, of course, directly contrary to the national policy to foster competition, as indicated by Section 7 of the Clayton Act (15 U.S.C.

18), by the Sherman Act (15 U.S.C. 1, *et seq.*), and by the Bank Holding Company Act of 1956 (12 U.S.C. 1841, *et seq.*).

Those laws were designed to encourage competition and to prevent monopolies, oligopolies or the foreclosure of markets. To construe 12 U.S.C. 36(c) as Respondent seeks, would be to promote the ability of states to run counter to the national policy on competition, and to allow states indirectly to graft upon the national banking system anti-competitive principles. Such a result should not be reached by this Court unless it is absolutely compelled by the statute. But, as is pointed out before, the statute now in question actually calls for the opposite.

Finally, it should be recognized that the substitution of the laws of the fifty states for a single uniform federal law with respect to branching is bound to create, at the very least, confusion and discord with regard to the establishment and administration of national banks. Indeed, it could well frustrate the very purposes of the national banking system and cripple the discretion which Congress intended the Comptroller of the Currency to have.

In the instant case, for example, the Utah statute provides that a bank must be in existence for at least five years before it can be acquired to be used as a branch by another bank. Assume a national bank has been in existence for less than five years, and it is in such dire financial straits as to be on the brink of failure. Another national bank is willing to acquire it so as not to have a closed bank in the community. The Comptroller, wishing to prevent the failure, determines to follow the oft-used course of preventing

a bank failure by merging the unsound bank with a sound bank. Under the theory of the courts below in the instant case, this cannot be accomplished because state law does not allow a bank to be acquired as a branch until the bank is in existence for five years. It should not be possible for the exercise of such a federal prerogative to be thwarted by state law in these circumstances.

Petitioner respectfully submits that Congress intended no such result to occur. It simply stated that it would not permit national bank branching in those geographical areas where a state would not permit it. Beyond that, however, its intention was to let the two systems compete and "The system which proves itself the better able to serve the people will in the end prevail." (77 Cong. Rec. 5896).

(F) The Position Taken by the Comptroller Herein Should be Upheld Unless Clearly Unreasonable

The Office of Comptroller of the Currency was first established in 1864. In the intervening 100 years it has been the Comptroller who has been responsible for authorizing the establishment of national banks. And, since 1927, when national bank branching was first authorized, the Comptroller has exercised the authority to approve these branches. That he has been successful in his administration is revealed by the following quotation:

> "Probably the outstanding example in the federal government of regulation of an entire industry through methods of supervision, and almost entirely without formal adjudication, is the regulation of national banks. The regulation of banking may be more intensive than the regulation of any other industry, and it is the oldest system of

economic regulation. The system may be one of the most successful, if not the most successful." Davis Administrative Law Treatise, Vol. 1, Section 4.04, p. 247.

It has long been the law that when Congress authorizes an official to administer a government program, the interpretation which that administrator places upon the statute and regulation under which he acts is given great weight. In *Bates & Guild Co.* v. *Payne* (1904), 194 U.S. 106, 109-110, 48 L. Ed. 894, 895, the Supreme Court affirmed a ruling of the Postmaster General which dealt with the question of whether a particular publication should be classified third-class mail or second-class mail. The Court replied:

> ". . . where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and . . . even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

This Court reiterated this philosophy in *Skidmore* v. *Swift & Company* (1944), 323 U.S. 134, 139-40, 89 L. Ed. 124, 129 noting:

> ". . . This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of advisory origin.
>
> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason

> of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

In *Unemployment Compensation Commission* v. *Aragon* (1946), 329 U.S. 143, 153-4, 91 L. Ed. 136, 145, this Court sustained the Commission's interpretation of the Alaska Unemployment Compensation Law, stating:

> "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The 'reviewing court's function is limited.' All that is needed to support the Commission's interpretation is that it has 'warrant in the record' and a 'reasonable basis in law.' National Labor Relations Bd. v. Hearst Publications, Inc., supra; Rochester Telephone Corp. v. United States, 307 U.S. 125, 83 L. Ed. 1147, 59 S. Ct. 754 (1939)."

In the District of Columbia, the jurisdiction from which this case has come to the Supreme Court, Judge David Pine, speaking in *Cargo Carriers* v. *Snyder* (D.C.D.C. 1952) 104 F. Supp. 258, affirmed (sub. nom. *Cargo Carriers* v. *Humphrey,* 93 U.S. App., D.C. 45, 206 F. 2d 488 (1953), said:

> ". . . it has long been settled that, when the performance of official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer upon the

law will not be interfered with unless it is clearly wrong and the official action arbitrary and capricious. *Hammond* v. *Hull,* 76 U.S. Appeals D.C. 301, 303, 131 Fed. 2d 23, 25, and cases collected therein at 259-260."

Petitioner submits that when, as in the present case, the interpretation which the Comptroller of the Currency has adopted is based upon a literal reading of the controlling statute, and is in accord with recognized principles of statutory construction, his interpretation should be sustained.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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